U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JAN 13 1989
CASE NO. 87-INA-697

IN THE MATTER OF

Young Chow Restaurant,
Employer,

on behalf of

Dian Zhuo Jiang,
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Schoenfeld and Tureck, Administrative Law Judges

JOHN M. VITTONE
Deputy Chief Judge

DECISION AND ORDER

The above-named employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the Act).

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. §656.21 have been met. These requirements include the responsibility of the employer to recruit U.S. Workers at the prevailing wage and u der prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. Availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File [AF herein] and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On July 16, 1986 Employer, Young Chow Restaurant, filed an application for alien labor certification on behalf of Dian Zhuo Jiang (AF 45), a citizen of China (AF 47). The position for which certification is sought is chinese specialty cook (AF 45).

The application for labor certification listed the job duties as follows: "Prepare and cook Chinese specialty dishes and sauces, such as fried rice, fried noodles, sweet & sour pork, chicken with peanuts, beef with broccoli, and so on" (AF 45). To qualify for the position, Employer required that applicants have six months experience in the job offered or six months experience as an apprentice cook. Employer also required applicants to be literate and to be able to use the chinese kitchen equipment (AF 45).

The Notice of Findings (NOF) was issued on March 25, 1987 (AF 39-42). The Certifying Officer found that the alien did not possess the job requirements that Employer was requiring of U.S. workers and that, therefore, the job requirements as stated did not represent the actual minimum qualifications for the job. The Certifying Officer indicated that Employer could rebut this finding by: (a) deleting the requirements, (b) submitting evidence which clearly shows that the alien, at the time of hire, had the qualifications Employer now requires, or (c) submitting documentation that it is not presently feasible from the standpoint of business necessity to hire a worker with less than the qualifications which employer now requires.

On rebuttal, Employer asserted that the alien did have the experience which was required of U.S. workers (AF 31-38). Employer contended that the alien worked as an apprentice cook for six months at Young Chow Restaurant in Washington, D.C. which is a separate and independent legal entity from Employer, a Maryland Corporation. To support its position, Employer provided Maryland and District of Columbia Certificates of Incorporation.

The Final Determination denying labor certification was issued on June 15, 1987 (AF 28-30). The Certifying Officer determined that the mere showing that two businesses are separate legal entities is not sufficient to demonstrate that they are two distinct Employers for labor certification purposes. The Certifying Officer indicated that Employer must show that the two entities do not share the same ownership and management policies regarding the hiring and employment of workers, and found that Employer had failed to present any evidence in this regard. The Certifying Officer consequently viewed the two restaurants as the same employer and denied labor certification. The Certifying Officer also found that Employer had failed to demonstrate business necessity as required by the NOF.

On October 13, 1987 Employer filed a brief in support of its appeal.[1]

DISCUSSION

Section 656.21(b)(6) requires Employer to document that its requirements for the job represent its actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience than that required by its job offer. Labor certification, therefore, will be denied when an alien has been employed in the position for which certification is sought, and has gained experience which is required by the job offer while working for the employer in that position. In the Matter of MMMATS, Inc., 87-INA-540 (November 24, 1987).

The Certifying Officer determined that the two Young Chow restaurants constituted a single employer for the purposes of §656.21(b)(6) and, therefore, found that Employer could not require U.S. applicants to possess the training which the Alien gained while working for Young Chow restaurant in Washington, DC. We find that Employer has not been given an adequate opportunity to demonstrate that the two restaurants are separate and distinct employers and that, therefore, this case should be remanded to the Certifying Officer.

In the NOF, the Certifying Officer indicated that Employer could rebut the NOF by submitting evidence which clearly shows that the Alien, at the time of hire, had the qualifications which Employer is now requiring. In rebuttal, Employer submitted documentation that the two Young Chow restaurants are separate legal entities and that, therefore, the experience gained by the alien at one establishment can be required of U.S. workers applying for a position at the other one. It was not until the Final Determination that Employer was made aware that showing that the two restaurants are separate legal entities would not constitute a showing that the two restaurants are separate and distinct employers for labor certification purposes. It appears that Employer made a good faith attempt to comply with the NOF. Where the Certifying Officer wants certain documentation in rebuttal, it is his burden to request such documentation. See In the Matter of Gencorp, 87-INA-659 (January 13, 1988.) In this case, the Certifying Officer could have indicated to Employer in the NOF that it would not be sufficient to document that the two restaurants were separate legal entities, or in the alternative, the Certifying Officer could have issued a second NOF allowing Employer to submit further rebuttal. As Employer has not had an adequate opportunity to rebut the Certifying Officer's finding, denial of labor certification cannot be affirmed.

The Certifying Officer also determined that Employer had failed to demonstrate that the requirement of six months experience arose from a business necessity. This is not a proper ground for denial. Although the Certifying Officer indicated in the NOF that Employer could rebut the findings by documenting that it is not presently feasible from the standpoint of business

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[1] We note that employer's appeal brief contains evidence which was not within the record upon which certification was based. Pursuant to 20 C.F.R. §650.26(b)(4) BALCA may not consider this evidence.

necessity to hire a worker with less than the qualifications which employer now requires, this was merely presented as one option and was not specifically required.

For the reasons discussed above, this case will be remanded to the Certifying Officer so that he may issue a new NOF allowing Employer an opportunity to demonstrate that the two Young Chow restaurants are separate and distinct employers for labor certification purposes.

ORDER

The Certifying Officer's decision is vacated and this case is REMANDED to the Certifying Officer for further proceedings consistent with this opinion.

JOHN M. VITTONE
Deputy Chief Judge

JMV/GHS/mb

In the Matter of YOUNG CHOW RESTAURANT, 87-INA-697
Judge LAWRENCE BRENNER, Concurring.

I agree with the Certifying Officer and the implication of the majority that an employer's showing that two restaurants are separate legal entities may not be sufficient to demonstrate that the they are separate employers for labor certification purposes. Kica, Inc., 88-INA-169 (July 18, 1988); Edelweiss Manufacturing Company, Inc., 87-INA-562 (March 15, 1988) (en banc). The C.O., on proper notice to the employer may ask for and consider additional evidence regarding the relationship between the two employers such as overlapping ownership and control.

LAWRENCE BRENNER
Administrative Law Judge

RE: Young Chow Restaurant
87-INA-697

SCHOENFELD: Administrative Law Judge, joined by Tureck,
Administrative Law Judge, Dissenting.

Because a showing that separate Certificates of Incorporation exist in Maryland and the District of Columbia for similarly named restaurants is prima facie evidence that they are separate legal entities, I respectfully dissent. I am of the opinion that the Board should reverse the Certifying Officer's denial of the application.

The facts of this case are undisputed as stated in the majority opinion. The only notice given in the NOF of the Certifying Officer's determination that the restaurant for whom the Alien previously worked and the Employer were not separate entities was the statement addressed to Employer that "[y]ou hired the alien in January, 1986 without the qualifications you now require." The Certifying Officer thus raised the issue by implication in the NOF. He went on to indicate three methods by which Employer could rebut. Employer, however, understood the basis of the Certifying Officer's determination and rebutted by presenting evidence refuting the Certifying Officer's underlying assumption that the prior employer and the applicant Employer, were one and the same.

The Certifying Officer raised the issue in the NOF only by implication and then rejected, without any rationale, Employer's rebuttal argument and evidence that the two restaurants are separate and distinct corporations. The majority, in remanding for further evidence, must agree, albeit silently, with the Certifying Officer's determination that Employer's showing in its rebuttal that the two restaurants are separate legal entities, incorporated in two different jurisdictions, Maryland and the District of Columbia, is not sufficient to show that they are separate and distinct employers.

I disagree. It is black-letter, hornbook law that separate corporations are separate legal entities. Without any attempt to "pierce the corporate veil" or supply evidence of commonality of ownership, management or direction, the Certifying Officer's rejection of the corporate certificates as prima facie proof that the two corporations are separate business entities is untenable. Thus, there is no support for the Certifying Officer's proposition that it was this Employer which hired the Alien in 1986.

Thus, although the stated purpose of the remand was to "[allow] the Employer an opportunity to demonstrate that the two Young Chow restaurants are separate and distinct Employers for labor certification purposes. . . ", Employer has in fact already done so. The actual result of this remand will be to give the Certifying Officer a second chance to find a reason to reject Employer's clear evidence. Since the Certifying Officer had this chance, and failed to use it, and the Certificates of Incorporation establish without question that the two restaurants are not the same employer, the Certifying Officer's decision should be reversed, and certification granted.

MICHAEL H. SCHOENFELD